Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Modernization of Media Regulation Initiative	)	**MB Docket No. 17-105**

In the Matter of	)	
	)	
Promoting the Availability of Diverse and	)	**MB Docket No. 16-41**
Independent Sources of Video Programming	)	

In the Matter of	)	
	)	
Authorizing Permissive Use of the "Next	)	
Generation" Broadcast Television Standard	)	**GN Docket No. 16-142**

REPLY COMMENTS OF INSP, LLC

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<u>**SUMMARY**</u>

INSP is an independently-owned cable television network that has achieved stability and growth in the multichannel marketplace despite ever increasing consolidation among content conglomerates, MVPDs and broadcasters, and market conditions that provide those entities with all of the leverage and independent networks with none.

The structure of today's television marketplace reflects significant problems that should be alarming to anyone concerned about the nature and origin of the television content being provided to the viewing public. While several opening-round commenters paint an illusion of a competitive multichannel landscape in which certain competition-enhancing regulations no longer are necessary, in reality that view is misleading and, if embraced by the Commission, could open the gates even wider to further consolidation and concentration of power significantly threatening the ***source*** diversity of programming provided to American television viewers.

In particular, certain commenters assert that over-the-top video is ubiquitous and MVPDs' traditional linear cable distribution no longer dominates the marketplace, and therefore that relaxation of the program carriage, program access and various other rules is warranted. However, that view ignores the fundamental nature of the marketplace in which INSP and all other multichannel cable networks currently operate – one in which MVPDs' linear television packages continue to reign supreme and a network's broad distribution on MVPDs' linear platforms is essential.

INSP submits these comments to focus the Commission's attention on how these proposals, and the misleading market view on which they are founded, could negatively impact independent programmers and the viewers they serve. The Commission must proceed cautiously in its review, and scrutinize all proposed regulatory repeals or amendments against the impact that such changes would have independent networks and their ability to not just survive, but thrive, in today's linear multichannel marketplace.

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REPLY COMMENTS OF INSP, LLC

I. INTRODUCTION AND SUMMARY

INSP is an independent cable television network that has achieved stability and growth in the multichannel marketplace despite ever increasing consolidation among content conglomerates, MVPDs and broadcasters, and market conditions that provide those entities with all of the leverage and independent networks with no\ne. INSP has advocated on behalf of independent networks' interests in prior FCC proceedings, urging the Commission to resist efforts of powerful stakeholders that increasingly would concentrate power in the hands of a small number of dominant media companies, and jeopardize the diversity of ***sources*** of television programming that Congress has mandated to serve the interests of the American viewing public.

The present proceeding has what on the surface seems a benign and sensible objective – the elimination of outdated and unnecessary media regulations. But an objective examination of the issues reveals significant problems that should be alarming to anyone concerned about the nature and origin of the content being provided to the public. While the opening-round comments of several parties paint an illusion of a competitive multichannel marketplace in which certain competition-enhancing regulations no longer are necessary, in reality that view is misleading and, if embraced by the Commission, could open the gates even wider to further consolidation and concentration of power. In the balance hangs one of the most important sources of the diversity that Congress has charged this Commission with promoting – independent television programmers.

INSP urges the Commission to proceed cautiously in its review, and to scrutinize all proposed regulatory repeals or amendments against the broad impact that such changes would have on the market itself, and, in particular, independent networks and their ability to not just survive, but thrive, in today's linear multichannel marketplace.

II. BACKGROUND REGARDING INSP

INSP is an independently-owned cable television network. Launched in 1990, INSP exhibits wholesome, family-friendly, general entertainment programming, which is watched and welcomed by millions of American families in an era when much of the video content available to them on television, in movie theaters and online continues to grow more and more coarse. INSP currently is distributed by all major cable and satellite distributors to a total of approximately 81 million homes. INSP consistently ranks in the top 35, highest-rated networks measured by Nielsen in average weekly C3 ratings. Its ratings are strong, continuing to grow, and indeed are higher than many networks owned by major conglomerate programmers.

While INSP's admirable development reflects the quality and appeal of its programming, it also is due in part to the fact that INSP, since its inception, has been distributed on a *license fee-free* basis. Yet, even as a free and highly-rated service, INSP has encountered very significant challenges in achieving its current distribution. The fact is that conglomerate-owned networks retain significant advantages in securing distribution and preferred channel position, even though their carriage agreements require MVPDs to pay them significant license fees. Going forward, INSP faces even greater challenges in retaining its distribution, promoting further growth, and evolving to an economic model that will enable it to increase production of its own high-quality and differentiated programming. In this regard, INSP is representative of scores of independent video programmers that face similar hurdles and are struggling to survive in the current television marketplace.

INSP addressed these market conditions in its comments in MB Docket No. 16-41, the Commission rulemaking related to promotion of independent and diverse sources of video programming, and again in GN Docket No. 16-142, the rulemaking related to the proposed transition to the ATSC 3.0 broadcast standard.[1] In its comments in MB Docket No. 16-41, INSP described the state of the current marketplace for independent and diverse programmers as one

[1] Comments of INSP, LLC, filed January 26, 2017, in *In the Matter of Promoting the Availability of Diverse and Independent Sources of Video Programming*, Notice of Proposed Rulemaking, MB Docket No. 16-41 (rel. October 2, 2016), https://www.fcc.gov/ecfs/filing/10126013185310; Reply Comments of INSP, LLC, filed June 8, 2017, in *In the Matter of Authorizing Permissive Use of the "Next Generation" Broadcast Television Standard*, Notice of Proposed Rulemaking, GN Docket No. 16-142 (rel. Feb. 24, 2017), https://www.fcc.gov/ecfs/filing/1060843974351. INSP incorporates those submissions by reference into these comments and the record of this proceeding.

characterized by (1) increasing consolidation among conglomerate programmers,[2] multichannel video program distributors ("MVPDs") and broadcasters, (2) conglomerate programmers' insistence that MVPDs carry numerous unwanted and underperforming channels as a condition to access to the programmers' marquee, must-have networks, (3) broadcasters' coercive use of retransmission consent rights to force carriage of their multicast channels and affiliated cable networks by MVPDs, (4) the anticompetitive effect of most favored nations provisions ("MFNs"), which result in an independent network's worst terms becoming its standard terms for all of its distributors, and (5) a reluctance among certain MVPDs to launch, and fairly and nondiscriminatorily compensate, independent networks. INSP explained that existing FCC regulations, and the Commission's enforcement of those rules, are inadequate to protect independent networks from discrimination, and implored the Commission to adopt strengthened provisions that will give independent programmers an opportunity to compete on fair and nondiscriminatory terms in a programming marketplace in which programming conglomerates and broadcasters increasingly occupy nearly all available MVPD channel capacity, and the diversity of ***sources*** of television programming available to the American viewing public on MVPD platforms is steadily declining.[3]

[2] INSP defined "conglomerate programmer" as "principally (1) companies that own large numbers of cable networks, and (2) media companies that own or are affiliated with multiple cable television program networks or with broadcast television stations and/or broadcast television networks."

[3] Conglomerate programmers argued in that proceeding that they provide a diverse array of channels that meet viewers' needs and interests. The facts confirm that they do not. First, independent programmers serve the interests of many audience groups that are ignored by the homogenized channels of conglomerate programmers. Second, while conglomerate programmers' channels may reflect a number of *genres* of content, they do not satisfy Congress' mandate "to promote competition in the delivery of ***diverse sources of video programming*** and to assure that the widest possible diversity of ***information sources*** are made available to the public from cable systems in a manner consistent with growth and development of cable systems." 47 U.S.C. §532(a) (emphasis added); *see also* 47 U.S.C. §257(a) and (b), and §521. When more and more of the cable television networks available to the public are coming under the control of just a few media conglomerates, that does not fulfill Congress' goal of diverse ***sources*** of video programming and the independent voices and viewpoints they represent.

INSP's reply comments in GN Docket No. 16-142 expressed related concerns over the impact that the proposed ATSC 3.0 regulations could have on independent programmers' ability to compete in a marketplace in which programming conglomerates threaten to occupy all available MVPD channel capacity. Expanding on Commissioner Clyburn's apt warning,[4] INSP explained how adoption of the ATSC 3.0 standard by broadcasters could have grave consequences for independent cable television networks. It pointed out that many of those networks very likely will be squeezed off of, or denied fair and nondiscriminatory access to, MVPDs' linear platforms due to the increased amount of MVPD channel capacity that will be consumed by broadcasters' higher resolution 3.0 signals and by MVPDs being coerced by broadcasters, in retransmission consent negotiations, to simulcast broadcasters' duplicating 3.0 and 1.0 signals during a long transition period. In this latter respect, INSP exposed the so-called "voluntary" transition period to be anything but voluntary given that most MVPDs will be unable to resist broadcasters' retransmission consent demands,[5] and noted that anecdotal reports indicate that some broadcasters already are requiring carriage of ATSC 3.0 signals even though it is not yet technically feasible. INSP demonstrated that any rules adopted should include the protections necessary to prevent broadcasters from using the ATSC 3.0 transition and existing retransmission consent rights to coerce MVPDs to allocate additional bandwidth that otherwise

[4] Statement of Commissioner Mignon Clyburn, accompanying Notice of Proposed Rulemaking, GN Docket No. 16-142.

[5] Any doubt about the power of retransmission consent to coerce MVPDs to provide capacity for carriage of broadcasters' affiliated channels is dispelled by the recent performance of Tennis Channel following its acquisition by Sinclair Broadcasting. In the eighteen months following its acquisition, thanks to Sinclair's retransmission consent leverage, and in a time when "new" launches are almost impossible to secure, Tennis Channel is reported to have added approximately 15 million MVPD viewers that it was unable to garner prior to its acquisition by Sinclair – an increase in its viewer base of nearly fifty percent, and to have forecasted that it would add another ten million in 2017. See *For Sinclair, Acquisition of Tennis Channel is Game, Set, Match (Dec. 21, 2016), at* https://www.mediavillage.com/article/for-sinclair-acquisition-of-tennis-channel-is-game-set-match/

would be available for the distribution of independent program networks, and urged the Commission to carefully examine capacity issues as part of its consideration of ATSC 3.0 transition rules.

III. THE COMMISSION MUST ENSURE THAT ANY REPEAL OR AMENDMENT OF ITS PROGRAM CARRIAGE, RETRANSMISSION CONSENT AND OTHER MEDIA REGULATIONS DOES NOT ADVERSELY AFFECT INDEPENDENT CABLE NETWORKS

The Commission's public notice initiating this proceeding stated its objective as the elimination or modification of regulations applicable to media entities, including television broadcasters, cable operators and satellite television providers, that are outdated, unnecessary or unduly burdensome.

In response to the public notice, interested parties filed more than 40 sets of initial comments. While most of the positions asserted in those comments are of an uncontroversial nature, several commenters have presented a view of the industry that is inaccurate and appears intended to serve as the foundation for rule changes that will allow, if not foster, increased concentration of power among MVPDs, content conglomerates and broadcasters, worsen the imbalance in negotiating leverage between those parties and independent programmers, and thereby reduce the diversity of sources of television programming available to the American viewing public over traditional linear cable and DBS television platforms.

In particular, those comments seek to paint the picture of a content marketplace that has grown highly competitive and far less concentrated than when many of the Commission's media rules were put into place.[6] Based on that characterization, they assert that various provisions in the Commission's program carriage, commercial leased access, retransmission consent and

[6] See, e.g., Comments of R Street Institute at 2-4; Comments of NCTA – The Internet and Television Association at 3, 14, 15; Comments of CBS Corporation, The Walt Disney Company, 21st Century Fox, Inc., and Univision Communications Inc. at 2.

program access regulations either are no longer necessary or warrant significant relaxation. For example, NCTA asserts that over-the-top video is ubiquitous and cable no longer dominates the marketplace, and therefore changes to the program carriage and program access rules are warranted.[7] Similarly, several major content companies (CBS, Disney, 21st Century Fox and Univision) (the "Content Companies") point to the "highly-competitive marketplace," and seek to downplay the effects of consolidation among conglomerate multi-network and multi-platform programmers.[8] And R Street Institute, also trumpeting the growth of OTT, advocates elimination of most program carriage rules, "maximizing liberty and free-market negotiations for licensing and carriage agreements …"[9] and asserting that "[p]rogrammers and broadcasters should generally be allowed maximal freedom to negotiate the terms of any licensing or carriage agreements the make with distributors",[10] i.e., free of any program carriage restraints.

These comments present positions with which INSP has taken issue in prior Commission proceedings, and that could lead the Commission to take ill-advised actions that would be inimical to independent programmers and the many millions of viewers they serve. Indeed, they ignore the fundamental nature of the marketplace in which INSP and all other multichannel cable networks currently operate – one in which traditional television distribution continues to reign supreme. Nielsen data confirms that daily time spent watching television viewing remains greater than all other media (including all forms of streaming). This is true for all demographic

[7] NCTA Comments at 14-18.

[8] Content Companies Comments at 1-3.

[9] R Street Comments at 5.

[10] R Street Comments at 6.

groups, even Millennials and Generation Z, who may be active participants in new media but who still tend to watch television.[11]

While experimentation with OTT, skinny bundles and other new offerings is occurring, with MVPDs and content conglomerates testing consumer reaction, widespread distribution on MVPDs' linear platforms remains essential to the economic viability of any 24/7 cable programming network and to serving the needs of the general public. It simply is not yet possible, and will not be for a number of years to come, for a network such as INSP to survive, let alone thrive, without broad MVPD distribution, which remains the Holy Grail for all multichannel networks, whether independent, content conglomerate-owned, vertically integrated or broadcast-affiliated. While OTT distribution may be the harbinger of the future, no network can hope to be economically viable without widespread distribution on MVPDs' linear platforms.

INSP cautions the Commission to scrutinize such broad-brush claims, for they harbor a motive that has much more serious implications than the benign objective on which the current proceeding is based. In examining the comments in this proceeding, the Commission must consider three truths, which remain inviolate: (1) broad distribution on MVPDs' linear platforms is essential to any cable television network; (2) fair and nondiscriminatory access to those platforms must be ensured to independent networks such as INSP; and (3) the unregulated, or lightly regulated, competitive marketplace envisioned by some commenters, free of restraints imposed by the Commission's program carriage rules, will not ensure such access by independent networks. Therefore, every change that the Commission considers making as an outgrowth of this proceeding must be measured against the impact that it may have on the

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[11] *The Nielsen Total Audience Report: Q1 2017*, Nielsen (rel. July 7, 2017) *available at* http://www.nielsen.com/us/en/insights/reports/2017/the-nielsen-total-audience-report-q1-2017.html.

competitive landscape in which independent programmers operate, and the Commission's governing statutory mandate to promote a diversity of ***sources*** of video programming for the American viewing public.

With that background, we address some of the specific comments of the parties.

A. Proposed Modifications to the Program Carriage Rules

Congress established the program carriage rules in Section 616 of the 1992 Cable Act to ensure that consumers would benefit from competition and diversity in the video programming and distribution markets. It directed the Commission to establish regulations governing program carriage agreements and related practices between MVPDs and video programming vendors. While the current program carriage rules purport to provide a method by which independent networks, at least in theory, can obtain redress in the case of an MVPD's discrimination in favor of a vertically integrated network, those rules do not apply across the board, have imposed a difficult burden of proof for allegations of unlawful discrimination, and have been saddled with procedural roadblocks that impede timely determinations. For those reasons, INSP previously has urged the Commission to make the program carriage rules more robust to protect independent programmers, and to resist calls to roll back their provisions, as some commenters now suggest.

For example, NCTA asserts that since the time when Section 616 was adopted,

> the marketplace characteristics that underlay Congress's concerns have been transformed *** [and] it's no longer the case that cable operators own any significant number of the hundreds of networks now carried on their systems. Moreover, cable operators now face stiff competition in their local markets and nationwide in the distribution of video programming to consumers.[12]

[12] NCTA Comments at 14-15.

These developments, NCTA contends, have "diminished the ability and incentive of cable operators and other MVPDs to engage in – and networks to demonstrate – the sorts of unfair, anticompetitive conduct at which Section 616 was aimed …."[13] Based on this postulation, NCTA argues that two aspects of Section 616 have been unreasonably expanded by the Commission and should be reformed.

First, NCTA argues that the Commission has misconstrued its own rule, Section 76.1302(h)(1), which sets forth the statute of limitations for program carriage complaints. NCTA claims that, under the Commission's most recent interpretation of the rule, a party could file a complaint years after entering into a contract simply by asking for renegotiation and notifying the MVPD of its intent to file a complaint after the MVPD declines.[14] NCTA argues that the Commission should rectify this situation by adopting an interpretive ruling that limits carriage complaints to unreasonable refusals to deal that occur *before* any contract is formed between the parties.[15] But such a rule would harm independent programmers because it would limit their ability to file complaints related to renegotiation of a contract set to lapse. Further, MVPDs could retaliate against independent programmers for exercising their right to file a complaint with the Commission alleging a violation of the program carriage rules, commencing an arbitration, or obtaining a remedy pursuant to the program carriage rules. The Commission should carefully consider the implications of this proposed change for independent networks, which can be vulnerable to MVPD discrimination and retaliation.

Second, NCTA argues that the attribution standard for the program carriage and program access rules should be harmonized with the cable cross-ownership rules because the Commission

[13] NCTA Comments at 15.

[14] NCTA Comments at 16-17.

[15] NCTA Comments at 17.

has defined an "attributable interest" in a way that captures nonvoting and insulated limited partnership and LLC equity interests as small as five percent.[16] Under the program carriage rules, cable and satellite companies may not "unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors." In other words, an independent network may challenge a vertically-integrated cable operator for giving preferential treatment to its own cable network, or a network in which a MVPD has an "attributable interest," as defined in the rules. Currently, the rules apply to equity interests as small as five percent. If the Commission were to amend or repeal this rule, it could harm the ability of independent programmers to demand carriage equivalent to that received by other programmers that are loosely affiliated with MVPDs.

It is true that harmonization can be a ground for regulatory revision in some circumstances. However, the purpose for which attributable ownership interests are considered in the context of cross-ownership evaluations, particularly in a local market, is different from the reasons it is considered in the context of evaluating national media concentration and consolidation and the impact of such developments on the ability of independent television networks to compete. Therefore, in evaluating proposed changes to the attribution standards of the program carriage and program access rules, the Commission should consider the impact that any such change would have on the assessment of consolidation among MVPDs, content conglomerates and broadcasters, and the ability of independent networks to gain fair and nondiscriminatory access to MVPDs' linear platforms.

[16] NCTA Comments at 17.

B. Modifications to the Commercial Leased Access Rules

NCTA argues that leased access has long outlived its statutory purpose, and that the Commission should reexamine, and reform, rules that force operators to incur leased access costs they cannot recover, specifically expenses incurred in responding to leased access inquiries.[17] Verizon also addresses the leased access regulations, arguing that the Commission should eliminate rate regulation for commercial leased access channels.[18]

The subtext of these comments seems to be a desire to reduce the amount of leased access programming on MVPDs' platforms. While commercial leased access is not a part of INSP's distribution model, an important point to be noted is that leased access channels occupy a significant and valuable portion of MVPDs' spectrum. If MVPDs' leased access obligations were to be scaled back, and capacity on MVPDs' platforms freed up, what would that space be used for? Rather than letting it be filled with more of the commonly controlled channels of content conglomerates and broadcasters, who no doubt will use their substantial leverage to make a land grab for even greater portions of MVPD spectrum, the Commission should ensure that any such liberated capacity is made available to independent programmers on fair and nondiscriminatory terms, rather than being used to further increase the concentration that content conglomerates and broadcasters have achieved through their use of coercive tying and bundling practices.

C. Reforms to Retransmission Consent Regulations

The several broadcasters that commented in this proceeding were largely silent regarding retransmission consent. This most likely is because broadcasters currently are quite pleased with the retransmission consent rules, which are to their advantage and give them substantial leverage

[17] NCTA Comments at 18.

[18] Comments of Verizon at 8-9.

to coerce MVPDs to carry broadcasters' affiliated channels and networks. However, this regime materially disadvantages independent networks, which do not have any such leverage.

The need for retransmission consent reform was called out in the opening comments of some parties. For example, Verizon notes that the rising costs of broadcast station programming and increasing blackouts of broadcast station signals harm consumers of MVPD services through increased subscription prices and periodic loss of desired programming.[19] Further, NTCA-the Rural Broadband Association states that the record is replete with evidence that the retransmission consent rules reduce consumer choice and impede the deployment of advanced services.[20] These and other parties propose a variety of reforms.

While independent programmers such as INSP do not have a stake in these particular issues, this proceeding presents an opportunity for the Commission to take note of how retransmission consent is used by broadcasters as leverage to force MVPDs to carry broadcasters' affiliated cable networks and raise the rates paid by consumers for television service. Should the Commission undertake any revision of the retransmission consent regime, it (1) must take care not to worsen the situation by giving broadcasters even greater leverage, and (2) should take steps to level the playing field for independent programmers that must compete for MVPD carriage with broadcasters' affiliated networks and channels.

D. Modifications to the Program Access Rules

Section 628 of the Communications Act, known as the "program access" rules, generally prohibits a cable operator or a satellite cable programming vendor in which a cable operator has an attributable interest from engaging in "unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any

[19] Verizon Comments at 15.

[20] NTCA – Rural Broadband Association Comments at 9.

[MVPD] from providing satellite cable programming . . . to subscribers or consumers."[21] Section 628(c) directed the Commission to promulgate regulations setting forth particular conduct that would be prohibited by the general prohibition in Section 628(b); such as exclusive and discriminatory contracts or other actions that have the effect of harming the ability of another MVPD to compete.

NCTA argues that the Commission has improperly expanded the narrow focus of Section 628, which it asserts was exclusively and specifically concerned with issues of DBS and other competitive MVPDs' access to cable-affiliated, satellite-delivered programming, into "a mini-antitrust law that broadly prohibits any conduct by a cable operator or a cable-affiliated program network that allegedly hampers the ability of any MVPD to compete."[22] Therefore, NCTA asks the Commission to restore Section 628 to what it asserts is Section 628's narrow focus on satellite-provided cable programming.

Although INSP and other independent networks are not directly affected by the program access regulations, any scaling-back of those rules could impact such networks if it contributes to further consolidation among MVPDs. For example, the proposed limits on the reach of Section 628 could impair the ability of small and midsized competitive MVPDs to survive and flourish, which in turn would increase the degree of concentration in the industry and the leverage of large MVPDs over independent networks such as INSP. Therefore, in considering proposals to narrow the program access rules, the Commission should consider the potential impact of such changes on not only the competitive cable operators who rely upon those rules to ensure access to MVPD-affiliated programming, but also on independent cable networks whose programming is distributed by the competitive cable operators.

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[21] 47 U.S.C. § 548(b).

[22] NCTA Comments at 10-13.

IV. CONCLUSION

Congress has directed the Commission to promote a diversity of ***sources*** of television programming and the varied viewpoints they represent, which is a duty that the Commission may not ignore. While it certainly is appropriate for the Commission to undertake a review of its media regulations, and to eliminate or modify those that are unnecessary, outdated or unduly burdensome, in doing so it must consider the impact that any such changes could have on the ability of independent programmers to survive in today's multichannel television marketplace. The interests and welfare of the American viewing public depend on the Commission's faithful discharge of that duty.

Respectfully submitted,

INSP, LLC